

Attorneys for Petitioners

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

AALIYAH JOLLY, et al.,

Petitioners,

VS.

INTUIT INC.

Respondent.

Case No. 5:20-cv-04728

**NOTICE OF MOTION AND
MOTION TO COMPEL
ARBITRATION**

Hearing

Date: August 21, 2020
Time: 10:00 am

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 21, 2020 at 10:00 AM or as soon thereafter as
3 the matter may be heard, Petitioners will and hereby do move this Court, pursuant to Section 4 of
4 the Federal Arbitration Act (“FAA”), 9 U.S.C. § 4, for an order compelling Respondent Intuit Inc.
5 to arbitrate Petitioners’ consumer fraud and antitrust claims against Intuit, in accordance with the
6 terms of the parties’ arbitration agreement.

7 Each Petitioner and Intuit entered into an agreement which, as Intuit itself recently insisted
8 in this district, requires arbitration of the Petitioner’s claims, and arbitration of any threshold
9 disputes about the proper interpretation of the parties’ agreement and the rules of arbitration the
10 agreement incorporates. Each Petitioner filed an individual demand for arbitration with the
11 American Arbitration Association (“AAA”), the organization that the parties’ agreement states
12 must administer Petitioners’ arbitrations. Intuit repeatedly asked AAA to reject Petitioners’
13 demands, and to determine that Petitioners must bring their claims in court instead of in arbitration.
14 When AAA rejected Intuit’s objections, Intuit sued Petitioners in California state court, seeking to
15 enjoin Petitioners’ arbitrations. Accordingly, Intuit has “fail[ed], neglect[ed], or refus[ed] . . . to
16 arbitrate under a written agreement for arbitration.” 9 U.S.C. § 4. And pursuant to the FAA, this
17 Court should “direct[] that such arbitration proceed in the manner provided for in [the parties’]
18 agreement.” *Id.*

19 This motion is based on this notice of motion, the attached memorandum of points and
20 authorities, the declaration of Warren Postman, all records on file with this Court, and such further
21 oral and written arguments as may be presented at, or prior to, the hearing on this matter.
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1 Dated: July 15, 2020

Respectfully submitted,

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SUMMARY OF ARGUMENT

Petitioners are 5,428 individuals who filed their taxes using TurboTax Online, an Intuit product. Petitioners were eligible for free tax-filing services through a program offered by the Free File Alliance—a consortium of tax preparation and filing companies of which Intuit was a member—which promised to offer free tax filing to the substantial majority of U.S. taxpayers, in return for the IRS agreeing to not enter the market for online tax-filing services. But instead of offering Petitioners the free filing services it had promised the IRS, Intuit actively steered Petitioners to its own commercial website, where it misleadingly told them that they were not eligible for its “TurboTax Free Edition,” and were instead required to pay fees to file their taxes online through TurboTax. Through this scheme, Intuit deceived a formidable potential competitor—the United States government—from entering the market for online tax preparation and filing services, and it colluded with the other members of the Free File Alliance to steer taxpayers away from free filing products and to the members’ respective paid products. Petitioners seek to individually arbitrate consumer fraud and antitrust claims against Intuit.

Recent proceedings in this district could understandably have left the impression that Intuit would be all too pleased to arbitrate with Petitioners, as Intuit sought to compel a class of consumers, raising claims substantially similar to Petitioners,’ to arbitration. *See* Intuit’s Mot. Compel, *In Re Intuit Free File Litig.*, No. 3:19-cv-02546-CRB (Oct. 28, 2019), ECF No. 97. That impression would be mistaken. While Intuit told the court in this district that its customers are *required* to arbitrate their claims, the company tells Petitioners—who demand arbitration—that they must proceed *in court*. That strategy is unfortunately not new. As another court in this district described it:

For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the

1 arbitration clause. No doubt, DoorDash never expected that so many would actually
 2 seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a
 3 class-wide lawsuit, the very device it denied to the workers, to avoid its duty to
 4 arbitrate.

5 *Abernathy v. DoorDash, Inc.*, No. C 19-07545 WHA, 2020 WL 619785, at *4 (N.D. Cal. Feb. 10,
 6 2020). Companies such as Intuit do not truly view arbitration as a speedy and efficient alternative
 7 to judicial proceedings for a substantial number of plaintiffs. They wield their arbitration clauses
 8 to shield them from liability, with no intention of complying with the contract they drafted if
 9 thousands of aggrieved consumers actually retain counsel and individually arbitrate their claims.
 10 This heads-we-win-tails-you-lose approach cannot be reconciled with the Federal Arbitration Act
 11 (“FAA”), which requires that arbitration agreements be strictly enforced according to their terms.

12 Petitioners filed individual demands for arbitration against Intuit, invoking the arbitration
 13 agreement included within Intuit’s Terms of Use (the “TERMS”). The agreement requires
 14 individual arbitration, administered by the American Arbitration Association (“AAA”) under
 15 AAA’s Consumer Arbitration Rules, of “any dispute or claim relating in any way to the services”
 16 offered on TurboTax’s website. *See* Decl. of Warren Postman, Ex. B. AAA’s rules, in turn, dictate
 17 that before an individual arbitrator has been appointed, or where a rule does not involve the
 18 “arbitrator’s powers and duties,” the rules “shall be interpreted and applied by the AAA.”
 19 Consumer Rule 53.¹ The rules also include a delegation clause, which states that an “arbitrator
 20 shall have the power to rule on his or her own jurisdiction, including any objections with respect
 21 to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim
 22 or counterclaim.” Consumer Rule 14(a).

23 AAA made a binding determination that each Petitioner’s arbitration demand met AAA’s
 24 filing requirements, and it began administering each Petitioner’s individual arbitration. But rather
 25 than proceed with Petitioners’ arbitrations, Intuit waged a months-long campaign to avoid
 26 arbitration. It objected to the merits of Petitioners’ claims, the form of Petitioners’ demands, the
 27 method by which Petitioners filed their demands, AAA’s ability to neutrally administer the
 28 arbitrations, and the amount of fees Intuit is required to pay under the terms of its agreement. *See*

¹ Available at https://adr.org/sites/default/files/Consumer_Rules_Web_1.pdf.

1 *generally* Postman Decl., Ex. D. Intuit also repeatedly argued that under the terms of the
 2 arbitration agreement and AAA’s rules, it may elect to force Petitioners’ demands out of arbitration
 3 and into small claims court. *See id.*

4 AAA rejected each of Intuit’s arguments, determining that these objections must be
 5 decided by individual arbitrators. Intuit paid the initial filing fees necessary for each Petitioner’s
 6 arbitration to proceed. But then, rather than accepting AAA’s determinations, Intuit sued
 7 Petitioners in California state court, seeking declaratory relief on questions that Intuit’s agreement
 8 says only an arbitrator may answer. Intuit’s lawsuit seeks: (i) a declaration and injunction that
 9 Petitioners may *not* proceed in arbitration and *must* proceed in court, and (ii) a declaration that
 10 Petitioners seek “de facto” class or representative arbitration barred by the TERMS. Intuit also
 11 seeks a declaration that California Senate Bill 707, which imposes sanctions on a “drafting party”
 12 that fails to pay the fees necessary for arbitration to proceed under a consumer arbitration
 13 agreement, is preempted by the Federal Arbitration Act (“FAA”). *See generally* Intuit’s Compl.,
 14 Postman Decl., Ex. E.

15 Intuit has breached its agreement by refusing to arbitrate and by asking a court to resolve
 16 disputes that have been delegated to an arbitrator. Accordingly, this Court should compel Intuit to
 17 arbitrate Petitioners’ claims under the FAA, which announces a simple test. When (i) the parties
 18 have entered into a valid arbitration agreement, (ii) the arbitration agreement covers the parties’
 19 dispute, and (iii) one party has refused to arbitrate, federal courts must enforce the arbitration
 20 clause according to its terms. *See* 9 U.S.C. § 4; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S.
 21 79, 83–84 (2002). That test is easily satisfied here.

22 First, every Petitioner completed the steps required to sign in to use Intuit’s TurboTax
 23 Online tax preparation and filing services—the same steps Intuit has repeatedly claimed are
 24 sufficient to bind its customers to the arbitration agreement—and has properly filed a demand to
 25 arbitrate under that agreement. *See* Intuit’s Mot. Compel, *In Re Intuit Free File Litig.*; Intuit’s
 26 Mot. Compel, *Callaway v. Intuit Inc.*, No. 19CV354484 (Cal. Super. Ct. Oct. 10, 2019), Postman
 27 Decl., Ex. H; Intuit’s Mot. Compel, *Macklin v. Intuit Inc.*, No. 19CV347208 (Cal. Super. Ct. Oct.

10, 2019), Postman Decl., Ex. I. Intuit has conceded that each Petitioner may invoke the agreement in asserting his or her claims. *See* Intuit’s Compl. ¶ 87, *id.*, Ex. E.

Second, Intuit’s arbitration agreement indisputably covers Petitioners’ underlying consumer fraud and antitrust claims. And by incorporating AAA’s rules, including the delegation provision, the parties’ arbitration agreement also covers all disputes about the form and substance of Petitioners’ arbitration demands, Intuit’s interpretation of the agreement, or whether AAA’s rules allow Intuit to force Petitioners’ claims out of arbitration and into court. As Intuit itself recently asserted in this district: “[A]n arbitrator—and not this Court—must decide threshold questions of arbitrability, including questions of scope and enforceability.” Intuit’s Mot. at 11, *In Re Intuit Free File Litig.*

Third, Intuit has refused to arbitrate. Intuit repeatedly asked AAA to close Petitioners’ arbitrations and force Petitioners’ claims into court. When AAA rejected Intuit’s arguments, determining that those arguments are reserved for individual arbitrators under the delegation clause incorporated by the parties’ arbitration agreement, Intuit sued Petitioners—its own customers—in California state court. Intuit has used that lawsuit to extract from AAA a 30-day stay of Petitioners’ arbitrations, it has sought an additional stay from AAA, and it has asked the state court to permanently enjoin Petitioners’ arbitrations and declare that Intuit can force Petitioners’ claims out of arbitration and into court. It is well-established that such conduct constitutes a refusal to arbitrate under the FAA. *See, e.g., Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 4–5 (1983) (concluding that a party refused to arbitrate when it filed a state court action (i) asserting various defenses to arbitration, (ii) seeking a declaration that its counterparty had no right to arbitrate, and (iii) seeking a stay of arbitration).

This Court should accordingly issue an “order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4. The parties’ agreement requires Intuit to arbitrate not only Petitioners’ underlying claims, but also Intuit’s objections to proceeding with Petitioners’ arbitrations. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). This Court should thus order Intuit to arbitrate the parties’ disputes in accordance with their arbitration agreement, making clear that Intuit must raise any arbitrability arguments—including its argument

1 that the parties' agreement allows it to unilaterally elect to litigate Petitioners' claims in court
2 rather than in arbitration—before individual arbitrators, and must therefore comply with AAA's
3 administrative determinations so that individual arbitrators may be appointed. *See Lifescan, Inc.*
4 *v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1011–13 (9th Cir. 2004) (conclusively deferring
5 to AAA's administrative determination).

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. Intuit Imposes a Broad Arbitration Agreement on Its Customers.

Intuit recently explained in a motion to compel a class of consumers to arbitration that each TurboTax customer is required to accept an arbitration agreement to use TurboTax's platform. *See* Intuit's Mot. Compel at 1, *In Re Intuit Free File Litig.* To access TurboTax Online during the relevant period, Intuit's customers were required to either create an Intuit account or sign into an existing account. *See* Sun Decl. ¶ 4, *In Re Intuit Free File Litig.*, ECF No. 97-2. When customers signed into their accounts, they clicked a button acknowledging that they "agree to the TurboTax Terms of Use." *Id.* ¶ 5. TurboTax's website further contained hyperlinked text leading customers to TurboTax's terms of use (the "TERMS"). *See id.* ¶ 6. And the TERMS contained an arbitration agreement. *See id.*, Ex. 1; Postman Decl., Ex. B. Each Petitioner used TurboTax Online to file his or her taxes, and therefore was required to complete the above process. *See* Postman Decl. ¶ 7; *id.*, Ex. A.

The TERMS provide that "[a]ny dispute or claim relating in any way to the services or this agreement will be resolved by binding arbitration, rather than in court, except that *you* may assert claims in small claims court if your claims qualify." TERMS § 14 (emphasis added).² The arbitration must be individual: Both the customer and Intuit "waive the right to participate in a class action or litigate on a class-wide basis," and both the customer and Intuit agree that they will not bring a dispute as a "representative proceeding." *Id.*

The TERMS also provide that each customer's arbitration "shall be conducted by the American Arbitration Association (AAA) before a single AAA arbitrator under the AAA's rules."³ *Id.* By designating AAA's Rules to govern disputes, Intuit and its customers have "made th[o]se

² After Petitioners filed their demands for arbitration, Intuit revised the TERMS applicable for the most recent tax year to give *both* parties the right to remove arbitrations to small-claims court. *See*, tax year 2019 TERMS § 14, available at <https://turbotax.intuit.com/corp/license/online/>. The TERMS governing Petitioners were substantively the same over all relevant time periods. For convenience, Petitioners will cite and quote the TERMS applicable to tax year 2018, as cited by Intuit in its motion to compel.

³ Available at https://adr.org/sites/default/files/Consumer_Rules_Web_1.pdf.

[rules] a part of their arbitration agreement,” and thereby “authorize the AAA to administer the arbitration.” Consumer Rules 1(a), (b). However, “[t]he consumer and the business may agree to change [AAA’s] Rules . . . in writing.” Consumer Rule 1(c). Before an individual arbitrator has been appointed, or where a rule does not involve the “arbitrator’s powers and duties,” the rules “shall be interpreted and applied by the AAA.” Consumer Rule 53. Once an individual arbitrator is appointed, “[t]he arbitrator shall interpret and apply the[] rules as they relate to the arbitrator’s powers and duties.” *Id.* The arbitrator also has exclusive authority over disputes regarding (i) a party’s obligation to commence arbitration, or (ii) the proper interpretation of an agreement: The “arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” Consumer Rule 14(a).

Finally, the TERMS state that “[p]ayment of all filing, administration and arbitrator fees and costs will be governed by the AAA’s rules, but if you are unable to pay any of them, Intuit will pay them for you.” *Id.* AAA “charges fees to compensate it for the cost of providing administrative services,” and it may “require the parties to deposit in advance of any hearings such sums of money as it decides are necessary to cover the expense of the arbitration, including the arbitrator’s fee.” Consumer Rules 4, 6. The Consumer Rules include a “fee schedule” that governs arbitration filing fees and arbitrator fees. Consumer Rule 4. The fee schedule applicable to Petitioners’ arbitrations imposes a \$200 nonrefundable filing fee on each consumer and a \$300 nonrefundable filing fee on Intuit. *See* Costs of Arbitration, AAA Consumer Rules at 33. The fee schedule further imposes a \$1,400 “case management” fee and a \$1,500 “arbitrator compensation” fee on the respondent company, to be paid as AAA initiates consumers’ cases. *See id.*

Intuit has repeatedly relied on the TERMS and the AAA rules the TERMS incorporate, to force its customers’ claims into arbitration, including recently in this district. *See* Intuit’s Mot. Compel, *In Re Intuit Free File Litig.*; Intuit’s Mot. Compel, *Callaway*; Intuit’s Mot. Compel, *Macklin*. In doing so, Intuit argued that both its customers’ underlying claims *and* any arguments about whether to require arbitration must be submitted to an arbitrator “because the parties agreed

1 to delegate the threshold questions of arbitrability to the arbitrator.” Intuit’s Mot. Compel at 9, *In*
 2 *Re Intuit Free File Litig.*

3 **B. Petitioners File Arbitration Demands That Meet AAA’s Filing Requirements.**

4 On October 1, 2019 and January 28, 2020, undersigned counsel filed demands for
 5 arbitration on behalf of 10,497 Intuit customers, including Petitioners.⁴ *See* Postman Decl. ¶ 11.
 6 Each demand was submitted on AAA’s official demand form, contained each claimant’s individual
 7 contact information, described each claimant’s individual claims, and requested individual relief.
 8 *See id.*, Ex. C. Intuit has admitted that Petitioners’ demands are “consistent with the procedural
 9 requirements of the TurboTax arbitration agreement.” Intuit’s Mot. at 11 n.5, *In Re Intuit Free*
 10 *File Litig.* (referencing Petitioners’ arbitration demands, in seeking to compel a class of Intuit
 11 customers to arbitration). AAA determined that each Petitioner’s demand met AAA’s filing
 12 requirements, and it invoiced Intuit for its administrative filing fees so that the arbitrations could
 13 move forward. *See* Postman Decl. ¶ 14.⁵

14 In response, while concurrently seeking in this district to compel a class of its customers
 15 to arbitration, Intuit undertook a months-long campaign to avoid commencing Petitioners’
 16 arbitrations. *See generally id.*, Ex. D. The company objected to the merits of Petitioners’ claims,
 17 *see id.* at 1–4, 8–13, 19–23 (letters of Feb. 10, Feb. 18, and Mar. 13), the form of Petitioners’
 18 demands, *see id.* at 1–4 (letter of Feb. 10), the method by which Petitioners filed their demands,
 19 *see id.*, and the fact that “the arbitration fees alone” to begin arbitrating Petitioners’ claims “would
 20 dwarf the total amount paid by these claimants to file their taxes using a TurboTax product,” *see*
 21 *id.* at 1–4, 8–13, 19–23, 42–44 (letters of Feb. 10, Feb. 18, Mar. 13, May 12). Intuit even suggested
 22 that AAA could not remain neutral because it had a pecuniary interest in collecting administrative
 23 fees—the very fees required by the published fee schedule and rules *Intuit chose* when it drafted
 24 its arbitration agreement. *See id.* at 19–23, 42–44 (letters of Mar. 13 and May 12). And it sent a
 25 letter to AAA’s General Counsel threatening AAA with “legal risk” if it did not reverse its

26 ⁴ On July 15, 2020, Petitioners amended their arbitration demands to add antitrust claims against
 27 Intuit under the Sherman Act, 15 U.S.C. §§ 1, 2.

28 ⁵ Petitioners’ counsel recently filed demands for arbitration on behalf of nearly 35,000 additional
 Intuit customers.

1 interpretation of the AAA Rules. *See id.* at 42–44 (letter of May 12). Intuit did not, however,
 2 dispute that Petitioners could invoke the TERMS’s arbitration agreement to pursue their claims.

3 Of all Intuit’s objections, its most vigorous, oft-repeated argument was that it could invoke
 4 AAA Consumer Rule 9(b) to force Petitioners out of arbitration and into small claims court. *See*
 5 *id.* at 1–4, 8–13, 19–23, 31–34, 42–44 (letters of Feb. 10, Feb. 18, Mar. 13, Apr. 20, and May 12).
 6 Consumer Rule 9(b) states:

7 If a party’s claim is within the jurisdiction of a small claims court, either party may
 8 choose to take the claim to that court instead of arbitration as follows:

9 (a) The parties may take their claims to small claims court without first filing with
 10 the AAA.

11 (b) After a case is filed with the AAA, but before the arbitrator is formally appointed
 12 to the case by the AAA, a party can send a written notice to the opposing party and
 13 the AAA that it wants the case decided by a small claims court. After receiving this
 14 notice, the AAA will administratively close the case.

15 (c) After the arbitrator is appointed, if a party wants to take the case to small claims
 16 court and notifies the opposing party and the AAA, it is up to the arbitrator to
 17 determine if the case should be decided in arbitration or if the arbitration case
 18 should be closed and the dispute decided in small claims court.

19 Commercial Rule 9. The TERMS governing Petitioners’ arbitrations, however, differ from
 20 Consumer Rule 9(b) in an important respect: They provide the small-claims option only to Intuit’s
 21 customers, not Intuit. *See* TERMS § 14 (stating that “[a]ny dispute or claim relating in any way
 22 to the services or this agreement will be resolved by binding arbitration, rather than in court, except
 23 that *you* may assert claims in small claims court if your claims qualify” (emphasis added)).

24 To avoid application of that plain language, Intuit argued that the TERMS cannot prevent
 25 the company from forcing Petitioners out of arbitration and into court because such a reading
 26 would violate Principle 5 of AAA’s Due Process Protocol. *See* Postman Decl., Ex. D at 8–13
 27 (letter of Feb. 18). Principle 5 states that “Consumer ADR Agreements should make it clear that
 28 all parties retain the right to *seek relief* in a small claims court for disputes or claims within the
 scope of its jurisdiction.” Due Process Principle 5 (emphasis added).⁶ AAA will only administer

⁶ Available at <https://kl.link/3ihjJsc>.

1 an arbitration “if the AAA determines the [parties’] agreement substantially and materially
2 complies with the due process standards.” Consumer Rule 1(d).

3 Intuit also framed its small claims court argument as beneficial for both the company and
4 Petitioners. *See* Postman Decl., Ex. D at 2, 4–5 (letter of Feb. 18). But even a cursory review of
5 the rules and procedures governing small-claims court in most states reveals why Intuit is so eager
6 to avoid arbitration and litigate Petitioners’ claims: Small-claims court is a decidedly inferior
7 forum for Petitioners, and far more favorable to Intuit. For instance, in California, a plaintiff in
8 small-claims court generally cannot be represented by an attorney. *See* Small Claims Court: Basic
9 Considerations and Questions.⁷ The plaintiff must present his or her case at an in-person court
10 hearing, unlike in arbitration, which may be decided on the papers. *See id.*; *see also* TERMS § 14.
11 And most significantly, a defendant that loses in California small claims court has an automatic
12 right of appeal, *de novo*, to California Superior Court while a plaintiff who loses generally has no
13 appeal rights. *See* Small Claims Appeals.⁸ By contrast, both parties to an arbitration may
14 challenge an award, but only on very narrow grounds. *See* 9 U.S.C. § 10. In sum, by forcing
15 Petitioners’ claims out of arbitration and into small-claims court, Intuit would gain a free shot at
16 each Petitioner’s case, would eliminate Petitioners’ ability to have counsel argue their claims, and
17 would save itself the arbitration fees and costs that it agreed to pay, while imposing significant
18 burdens on Petitioners, who would be required to argue their own claims at in-person hearings.

19 To preserve their right to arbitration, Petitioners asked AAA to reject Intuit’s small claims
20 argument. Petitioners first noted that Intuit’s argument turns on an interpretation of the TERMS’s
21 arbitration agreement, *i.e.*, that by saying “you” have a right to elect small-claims court, the
22 TERMS truly meant “we and you.” *See* TERMS § 14. But by incorporating AAA’s delegation
23 clause, the arbitration agreement requires an arbitrator, not Intuit or a court, to decide what the
24 arbitration agreement means. Petitioners also argued that the plain language of the TERMS’s
25 arbitration agreement reserves the small-claims option only for Intuit’s customers, not for Intuit.
26 To the extent that language could be read to conflict with Consumer Rule 9(b), the Consumer

27 ⁷ Available at <https://kl.link/3dIIK38>.

Rules state that “[t]he consumer and the business may agree to change these Rules . . . in writing,” Consumer Rule 1(c), which Petitioners and Intuit have done via the TERMS. Petitioners further argued that applying the TERMS to prevent Intuit from removing Petitioners’ arbitrations to court does not conflict with AAA’s Due Process Protocol, which only protects a party’s “right to *seek relief* in a small claims court.” Due Process Protocol, Principle 5 (emphasis added). Petitioners, not Intuit, “seek relief” in these matters. Finally, Petitioners argued that at most, the TERMS are ambiguous as to whether Intuit can force Petitioners out of arbitration, and as Intuit has repeatedly argued, the federal policy favoring arbitration requires that any ambiguity be construed in favor of arbitration. *See, e.g.*, Intuit’s Mot. at 12, *In Re Intuit Free File Litig.* (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration” (quoting *Moses H. Cone*, 460 U.S. at 24–25)).

AAA refused to close Petitioners’ cases in favor of small-claims court. AAA explained that it “views the parties’ disagreement regarding the interpretation and application of the small claims provision in the parties’ arbitration clause, Rule 9 of the Consumer Arbitration Rules, and the AAA’s Consumer Due Process Protocol as an arbitrability dispute,” and thus “will proceed with the administration of these cases so that the issue can be presented to the appointed arbitrators.” *See* Postman Decl., Ex. D at 35–36 (letter of Apr. 24); *see also id.* at 17, 29–30 (letters of Mar. 6 and Apr. 9). AAA further confirmed that it “conduct[ed] an administrative review of the parties’ arbitration agreement at the time of filing and determined that it substantially and materially complies with the due process standards of the Consumer Due Process Protocol.” *Id.* at 35–36 (letter of Apr. 24).

Intuit next sought to elevate the parties’ small-claims dispute to AAA’s Administrative Review Counsel (“ARC”). *See id.* at 19–23 (letter of Mar. 13). However, the ARC only reviews “certain administrative decisions arising in the AAA’s large, complex domestic caseload.” ARC Review Standards.⁹ Because each Petitioner’s individual arbitration is not large or complex, AAA declined to submit the parties’ dispute to the ARC.¹⁰ *See* Postman Decl., Ex. D at 29–30 (letter of

⁹ Available at <https://kl.link/37LerR7>; *see also* ARC Overview and Guidelines, available at <https://kl.link/2YkSfde>.

¹⁰ In addition, the ARC reviews “objections to arbitrators, locale determinations, and whether the

1 Apr. 9). AAA also declined to appoint a single arbitrator to resolve the small claims dispute as to
 2 all Petitioners in a representative proceeding, which would clearly violate the TERMS's
 3 representative action waiver. *See* Postman Decl. ¶ 22. Having rejected all of Intuit's objections,
 4 AAA imposed a deadline of March 20, 2020, for Intuit to pay the initial filing fees necessary to
 5 commence administration of Petitioners' arbitrations. *See id.*, Ex. D at 17–18 (letter of Mar. 6).
 6 Intuit paid those fees “under protest.” *See id.* at 31–34 (letter of Apr. 20).

7 In accordance with its rules and the TERMS, AAA has continued to administer Petitioners'
 8 cases as “individual arbitrations, with individual parties and case numbers.” *See id.* at 35–36 (letter
 9 of Apr. 24). As of the filing of this motion, AAA has initiated hundreds of Petitioners' individual
 10 arbitrations—the first step towards assigning individual arbitrators—and has assured the parties
 11 that it will initiate the remaining arbitrations in short order. *See id.* ¶ 28. Under the TERMS and
 12 AAA's rules, Intuit will owe a \$1,400 Case Management Fee and a \$1,500 Arbitrator Retainer fee
 13 for each Petitioner whose arbitration is initiated. *See* Costs of Arbitration, AAA Consumer Rules
 14 at 33. Those fees will be due on a rolling basis in September, October, and November 2020, at
 15 which point AAA will assign an arbitrator to each Petitioner's case. *See* Postman Decl. ¶ 19; *id.*,
 16 Ex. D at 48–50 (letter of May 27).

17 **C. Intuit Ignores AAA's Administrative Determinations and Asks A Court to Resolve**
 18 **Issues Delegated to Arbitration By Its Agreement.**

19 By agreeing to arbitrate under the AAA rules, Intuit agreed to be bound by AAA's
 20 administrative determinations and to delegate questions of arbitrability to individual arbitrators.
 21 *See* Consumer Rule 14(a). But Intuit refuses to accept AAA's administrative determinations, and
 22 it refuses to accept the consequences of the delegation clause it wrote into the TERMS. On June
 23 12, 2020, Intuit sued Petitioners in Los Angeles Superior Court. *See generally* Intuit's Compl.,
 24 Postman Decl., Ex. E. Intuit's complaint seeks declaratory and injunctive relief on three grounds,
 25 in an effort to halt Petitioners' arbitrations and force Petitioners out of arbitration and into court.
 26 First, Intuit seeks a declaration and injunction that Petitioners may *not* proceed in arbitration and
 27 filing requirements contained in the AAA Rules have been met,” ARC Review Standards at 1,
 28 none of which are raised by Intuit's small claims argument. The ARC “is not authorized to make
 arbitrability determinations.” *Id.* at 3.

1 must proceed in court. *See* Compl. ¶¶ 85–90; *id.* at 29. Second, Intuit asks for a declaration that
 2 Petitioners seek “de facto” class or representative arbitration barred by the TERMS. *See id.* ¶¶
 3 99–109; *id.* at 29. Third, Intuit argues that California Senate Bill 707, which imposes sanctions
 4 on a “drafting party” that fails to pay the fees necessary for arbitration to proceed under a consumer
 5 arbitration agreement, is preempted by the FAA. *See id.* ¶¶ 91–98; *id.* at 29. Intuit has used the
 6 lawsuit to extract from AAA a 30-day stay of Petitioners’ arbitrations, under AAA Consumer Rule
 7 1(f). *See* Postman Decl., Ex. F. And it has asked AAA to extend that stay through September,
 8 though no AAA rule permits such a delay. *See id.*, Ex. G.

9 Intuit’s declaratory-judgment action violates the TERMS because it asks a court to decide
 10 questions that are unambiguously delegated to arbitration, and it ignores AAA determinations that
 11 Intuit is required to honor. And Intuit’s request for declaratory relief regarding California Senate
 12 Bill 707 is ripe only if Intuit plans to withhold the fees required to proceed with Petitioners’
 13 arbitrations. Petitioners therefore seek an order from this Court compelling Intuit to arbitrate in
 14 the manner required by the TERMS.

15 II. STATEMENT OF ISSUES TO BE DECIDED

16 Whether this Court should compel Intuit to adhere to its arbitration agreement with
 17 Petitioners and comply with AAA’s administrative determinations.

18 III. ARGUMENT

19 The FAA requires that courts “enforce [arbitration agreements] according to their terms.”
 20 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In service of that mandate, the
 21 FAA codifies a party’s right to seek specific performance of an arbitration agreement. *See* 9 U.S.C.
 22 § 4 (stating that a party to an arbitration agreement who is “aggrieved by the alleged failure” of
 23 another party to arbitrate may obtain an “order directing that such arbitration proceed in the manner
 24 provided for in such agreement.”). Intuit made each Petitioner an offer, when that Petitioner used
 25 TurboTax’s online platform, to arbitrate the Petitioner’s disputes arising from his or her use of the
 26 platform, and to arbitrate disputes about the proper interpretation of the parties’ agreement and the
 27 AAA rules the agreement incorporates. Each Petitioner has accepted that offer and invoked the
 28

1 agreement to arbitrate claims against Intuit, and Intuit has conceded that the agreement applies to
2 each Petitioner's claims.

3 Petitioners did everything required of them to commence arbitration under the arbitration
4 agreement and AAA's rules. AAA made an administrative determination that each Petitioner's
5 demand met AAA's filing requirements. AAA further determined that Intuit's small claims
6 argument raises a question of arbitrability delegated to the arbitrator overseeing each individual
7 Petitioner's arbitration. The arbitration agreement makes AAA's rules binding on Intuit, *see C&L*
8 *Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 n.1 (2001)
9 (holding that when specified by contract, AAA's Rules "are not secondary interpretive aides that
10 supplement [the] reading of the contract; they are prescriptions incorporated by the express terms
11 of the agreement itself"), and therefore Intuit must comply with AAA's administrative
12 determinations under those rules, *see Lifescan*, 363 F.3d at 1011–13 (conclusively deferring to
13 AAA's administrative determination).

14 But even though Intuit has invoked its TERMS, and the delegation requirement contained
15 therein, to avoid facing claims in this very district, Intuit has refused to arbitrate with Petitioners
16 "in the manner provided for in [its] agreement." 9 U.S.C. § 4. Intuit justifies its refusal by asserting
17 that Petitioners' demands are deficient and can be removed to small claims court. But the TERMS
18 do not allow Intuit to decide for itself whether a demand for arbitration is sufficient or what the
19 agreement means. Rather, the TERMS require that those issues be resolved exclusively in
20 arbitration. And under the AAA rules the TERMS incorporate, AAA has the exclusive authority
21 to administer the arbitrations and to interpret the rules before an arbitrator has been appointed.
22 AAA did just that, considering and then rejecting Intuit's objections. This Court should remedy
23 Intuit's refusal to accept—as the TERMS require—AAA decisions it does not like.

A. Intuit and Petitioners are Parties to an Arbitration Agreement That Covers Petitioners' Claims and the Parties' Disputes.

The FAA requires a court to compel arbitration where (i) the parties have entered into a valid arbitration agreement, and (ii) the arbitration agreement covers the parties' disputes. *See Howsam*, 537 U.S. at 83–84. Where, as here, the parties have delegated to the arbitrator questions about whether or how the parties must arbitrate, the court need only determine that the parties have entered into a valid arbitration agreement. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (“Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.”).

Each Petitioner used TurboTax Online to file his or her taxes within the applicable limitations period. *See* Postman Decl. ¶ 7. Thus, Petitioners necessarily completed the steps Intuit claims gave rise to an arbitration agreement “when they each signed into their respective TurboTax accounts.” Intuit’s Mot. at 8, *In Re Intuit Free File Litig.* By Intuit’s own account, Petitioners and Intuit have agreed that each Petitioner is party to a valid agreement to arbitrate. *See* Intuit Compl. ¶ 87 (Acknowledging that “Intuit and Defendants contractually agreed” to “individual arbitration”), Postman Decl., Ex. E. Each Petitioner has invoked that agreement to arbitrate consumer fraud and antitrust claims against Intuit. *See generally id.*, Ex. C.

That the parties have entered into a valid arbitration agreement is sufficient by itself to compel arbitration, *see Schein*, 139 S. Ct. at 530, because Intuit’s arbitration agreement delegates to an arbitrator any questions regarding the agreement’s application and scope. *See* TERMS § 14; AAA Consumer Rule 14(a) (stating that an “arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”). Intuit has argued this very point when attempting to avoid litigating arbitrability questions in court: “[A]n arbitrator—and not this Court—must decide threshold questions of arbitrability, including questions of scope and enforceability.” Intuit’s Mot. Compel at 11, *In Re Intuit Free File Litig.* Regardless, there is no doubt that both Petitioners’ underlying claims and Intuit’s objections are arbitrable: The parties

1 agreed to arbitrate “any dispute or claim relating in any way to the services” offered by TurboTax,
 2 TERMS §§ 1, 14, and they agreed that the “arbitrator shall have the power to rule on his or her
 3 own jurisdiction, including any objections with respect to the existence, scope, or validity of the
 4 arbitration agreement or to the arbitrability of any claim or counterclaim,” Consumer Rule 14(a).

5 **B. Intuit Has Refused to Arbitrate.**

6 Once a court concludes that the parties have entered into a valid arbitration agreement
 7 covering their dispute, the court should compel arbitration if one party has refused to arbitrate. *See*
 8 9 U.S.C. § 4. Intuit’s conduct before AAA and in state court shows that it has refused to arbitrate,
 9 and will continue to do so until this Court orders it to proceed with Petitioners’ arbitrations.

10 When a party seeks a court order enjoining arbitration, it has refused to arbitrate. A long
 11 line of cases follows this common-sense reasoning. *See, e.g., Moses H. Cone*, 460 U.S. at 4–5
 12 (concluding that a party refused to arbitrate when it filed a state court action (i) asserting various
 13 defenses to arbitration, (ii) seeking declarations that its counterparty had no right to arbitrate, and
 14 (iii) seeking a stay of arbitration); *Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1145 (D.
 15 Ariz. 2009) (“[T]he right to compel arbitration accrues once one of the parties takes an unequivocal
 16 position that it will not arbitrate Here, Plaintiff has opposed [the] motion to enforce arbitration
 17 on numerous grounds. Plaintiff has thereby resisted arbitration and unambiguously manifested an
 18 intention not to arbitrate.” (citations and internal quotation marks omitted)); *Allemeier v. Zyppah,*
 19 *Inc.*, No. CV 18-7437 PA (AGRx), 2018 WL 6038340, at *3 (C.D. Cal. Sept. 21, 2018) (“The
 20 Court finds that by repeatedly refusing to pay its portion of the filing fee as determined by the
 21 AAA, attempting to compel Petitioner to arbitrate in Nevada, and continuing to oppose arbitration
 22 here, [the respondent] has failed or refused to arbitrate.”).

23 Intuit’s conduct goes beyond even those cases. It has repeatedly urged AAA to reject
 24 Petitioners’ arbitration demands. It has breached the TERMS by suing Petitioners in state court,
 25 impermissibly asking the court to decide questions that the TERMS delegate exclusively to
 26 arbitration. *See generally* Intuit’s Compl., Postman Decl., Ex. E. It has used that lawsuit to delay
 27 Petitioners’ arbitrations. *See id.*, Exs. F, G. And it has asked the state court to enjoin Petitioners
 28

1 arbitrations altogether and force Petitioners to litigate their claims in court. *See* Intuit’s Compl. at
 2 29. This Court should compel arbitration under Section 4 of the FAA.

3 **C. Intuit Must Comply With AAA’s Administrative Determinations, and Raise Its**
 4 **Arguments With Individual Arbitrators.**

5 In its recent motion to compel arbitration in this district, Intuit explained at length that the
 6 TERMS and AAA’s Rules delegate to arbitrators any threshold issues regarding the interpretation
 7 or enforceability of the TERMS or AAA’s rules. *See* Intuit’s Mot. Compel at 9-11, *In Re Intuit*
 8 *Free File Litig.* That agreement to arbitrate gateway disputes “is simply an additional, antecedent
 9 agreement the party seeking arbitration” asks a court to enforce. *Rent-A-Ctr.*, 561 U.S. at 70. And,
 10 just “as a court may not decide a merits question that the parties have delegated to an arbitrator, a
 11 court may not decide an arbitrability question that the parties have delegated to an arbitrator.”
 12 *Schein*, 139 S. Ct. at 530. Accordingly, while Intuit repeatedly argued to AAA that the TERMS
 13 and AAA’s rules allow Intuit to avoid arbitrating Petitioners’ claims, such arguments are not a
 14 ground for avoiding arbitration; they are simply threshold disputes that Intuit must arbitrate. AAA
 15 determined as much, and has begun initiating Petitioners’ cases. *See* Postman Decl. ¶ 19. But
 16 rather than participating in the arbitral process, Intuit has asked a California state court to rule on
 17 the disputes AAA concluded are delegated to arbitrators.

18 Where a party disagrees with AAA’s administrative determinations, it may submit that
 19 disagreement to the arbitrator once the arbitrator is appointed. It may not, however, ignore AAA’s
 20 determinations and prevent an arbitral appointment in the first place, as Intuit has attempted. The
 21 Ninth Circuit’s decision in *Lifescan* is illustrative. *Lifescan* involved a AAA arbitration fee dispute
 22 between Lifescan and its counterparty, Premier. *See* 363 F.3d at 1011. AAA had initially
 23 determined that the parties should split the fees equally. *Id.* However, upon learning that Premier
 24 was unable to pay its share of fees, AAA reallocated Premier’s fees to Lifescan, with the
 25 expectation that Lifescan could recoup its fees as part of any award. *Id.* Lifescan refused to
 26 comply with AAA’s determination, and instead ran to court, obtaining an order compelling
 27 Premier to pay the filing fees it had been initially allocated. *Id.* The Ninth Circuit reversed that
 28 order. *See id.* at 1013. It reasoned that (i) the parties incorporated AAA’s rules; (ii) AAA’s rules

1 “recognize the arbitrators’ discretion to interpret the scope of their authority”; and (iii) while
 2 AAA’s fee reallocation “may not be an ideal solution to the problem of a party’s failure to pay its
 3 share of the fees,” AAA was well within its discretion to make that determination. *Id.* at 1012–13.
 4 Accordingly, the parties’ arbitration had “proceeded pursuant to the parties’ agreement and the
 5 rules they incorporated,” and neither Lifescan nor the district court had any basis to ignore AAA’s
 6 determination. *Id.* Lifescan was required to proceed with arbitration as AAA dictated. *Id.* at 1013.
 7 An unbroken line of cases confirms this principle. *See, e.g., Dealer Comp. Servs., Inc. v. Old*
 8 *Colony Motors, Inc.*, 588 F.3d 884, 888 (5th Cir. 2009) (conclusively deferring to AAA’s
 9 administrative determinations, to “preserve[] the flexibility and discretion in the hands of the
 10 arbitrators, a policy end the FAA favors”); *Williams v. Tully*, No. C-02-05687-MMC, 2005 WL
 11 645943, at *5 (N.D. Cal. Mar. 18, 2005) (“Once it is determined . . . that the parties are obligated
 12 to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of
 13 the dispute and bear on its final disposition should be left to the arbitrator.”).

14 Because Intuit cannot deny that it entered into a valid arbitration agreement covering each
 15 Petitioner’s underlying claims and delegating all threshold arbitrability disputes to individual
 16 arbitrators, and because Intuit has refused to submit those disputes to arbitration, this Court’s role
 17 is clear: It should “enforce the arbitration agreement in accordance with its terms,” *Chiron Corp.*
 18 *v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000), and issue an “order directing
 19 that such arbitration proceed in the manner provided for in such agreement,” 9 U.S.C. § 4; *see also*
 20 *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1006 (N.D. Cal. 2011) (“It was Congress’s
 21 clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into
 22 arbitration as quickly and easily as possible.” (quoting *Bell v. Koch Foods of Miss., LLC*, 358 Fed.
 23 Appx. 498, 500–01 (5th Cir. 2009))). Accordingly, this Court should order that Intuit must raise
 24 any arbitrability arguments—including Intuit’s argument that the TERMS allow it to unilaterally
 25 elect to litigate Petitioners’ claims in small claims court rather than in arbitration—before
 26 individual arbitrators, and must therefore comply with AAA’s administrative determinations so
 27 that individual arbitrators may be appointed.

IV. CONCLUSION

For the foregoing reasons, Petitioners' motion to compel arbitration should be granted.

Dated: July 15, 2020

Respectfully submitted,

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